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COMMUNICATION FROM THE UNITED STATES

Transparency in Domestic Regulation

The attached communication has been received from the delegation of the United States with the request that it be circulated to Members of the Council for Trade in Services.

I. INTRODUCTION

1. Transparency in domestic regulation is characterized as the availability of information necessary to evaluate the costs and opportunities of operating in a given commercial market. Therefore, transparency in domestic regulation should allow all market participants access to information on regulations, procedures, and other measures that affect their interests, the ability to comment on such proposals, and procedurally fair and open treatment. Both domestic and foreign participants in commercial relations should be given the same access to relevant information – if, for example, foreign firms are given lesser access to such information than domestic firms, trade barriers can be created. In addition to enhancing commercial relations, regulatory transparency provides a citizenry with a better understanding of domestic policy objectives and thereby contributes to public confidence in government, providing support for domestic policy objectives and the rationale for trade liberalization. Transparent regulatory regimes can lead to benefits for both small and large economies, such as good governance, improving public confidence in, and legitimacy of the regulatory regime, and increasing investment while promoting trade in goods and services.¹

2. Transparent domestic regulation can create more efficient markets and an attractive environment for investment and economic growth by providing firms with the information necessary to evaluate their ability to access and operate in foreign markets. Non-transparent domestic regulation results in additional trade barriers, which can nullify a liberal trade regime. Thus, transparency is necessary to preserve trade liberalization and to ensure that regulatory regimes do not become barriers to trade and investment. This is particularly important for service suppliers because of the complexity and costs involved in the establishment of a commercial presence or the cross-border supply of services. Many global organizations, such as the IMF, are promoting transparency by developing transparency standards for governments to follow.²

¹This paper focuses on the role of regulatory bodies (i.e., administrative agencies engaged in regulatory processes).

²Such as the IMF's Manual on Fiscal Transparency, and the Special and General Data Dissemination Standards. Ann M. Florini, "Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency," paper prepared for the Annual World Bank Conference on Development Economics, Washington, DC, April 28-30, 1999.

3. Transparency can be beneficial to all countries. Some countries see transparency as an additional administrative burden and a poor use of already scarce resources. Undoubtedly, governments need to devote resources toward the initial set-up and continuing maintenance of a transparent regulatory system. However, a transparent regulatory system's benefits can far outweigh the costs of its establishment. The advent of new technologies such as the Internet can serve to reduce the costs of transparency.³ The costs of a non-transparent regime may come at the expense of economic growth and development, and contribute to a perceived lack of legitimacy. Members should work together so that all countries can realize transparency's benefits, both domestically, and in other markets. This is particularly true for countries with small and medium sized enterprises that may not have the resources to enter and do business in markets with non-transparent regulatory regimes. The United States is interested particularly in discussing means to increase the participation of developing countries in this debate to address their particular concerns.

II. PROPOSAL

4. The United States proposes that Members consider a wide application of measures for transparency in domestic regulation, recognizing that all levels of government must retain the ability to set, maintain, and enforce high levels of protection for consumers, health, safety, and the environment. The United States wishes to begin this debate by discussing which practices in domestic regulation have been effective for Members, to develop principles that support existing GATS measures and promote greater transparency in domestic regulation, without prejudice to concepts that have been suggested for specific sectors.⁴ Such principles could provide all countries with a blueprint to reap the benefits of an open, transparent regulatory system. These principles should be administered in a reasonable, objective and impartial manner and should not discriminate against foreign suppliers. The United States believes that the following principles guiding transparency in domestic regulation should be an important part of this debate.

A PRIOR NOTIFICATION AND COMMENT

5. Many countries administer some variation of prior comment processes. For example, Korean regulators consult through public hearings or notices or other means, and regularly consult with foreign trade associations. In Japan, both foreign and domestic parties may comment when public regulations are introduced, amended or repealed by a cabinet order or ministerial ordinance, with certain exceptions. In Mexico, prior comment is established in certain sector-specific laws, which require publication of proposals for comment by foreign or domestic participants.⁵

6. Meaningful notice and comment periods provide a reasonable assurance that interested parties will see the notice and have adequate time to respond. The ability of individuals and firms to comment on regulatory measures before implementation offers a number of benefits, including increased efficiency and credibility of the proposed measure. Prior comment also reduces uncertainty and discriminatory treatment in a given market as all parties are better informed through the ability to participate in the development of regulations. Prior comment allows the opportunity to solicit views on proposed new or amended regulations from all interested parties, including domestic and foreign service suppliers operating or seeking to operate in the national market as well as the general public so that the provision is developed under an informed debate. Established mechanisms to solicit and respond to public inquiries and comments help make the process easier to administer. Dismissing the

³ Ibid; and OECD, "Trade and Regulatory Reform: Insights from the OECD Country Reviews and Other Analysis." December 7-8, 2000.

⁴ For example, the United States tabled an initial sectoral proposal on financial services (S/CSS/W/27) that includes proposed approaches on regulatory transparency and other issues related to regulation.

⁵ OECD, "Trade and Regulatory Reform: Insights from the OECD Country Reviews and Other Analysis."

need to consider and respond to comments on the proposed measures on the grounds of burdensome costs can deprive countries of the benefits such procedures provide. Beyond the initial start-up costs, maintenance costs for such a system can be low. As previously mentioned, new technologies such as the Internet have further reduced the financial burden associated with a prior consultation system.⁶ In order to complement the prior comment mechanism, pending regulations, comments received by the regulators, and responses to the comments all should be made available to the public.

B. APPLICATION PROCESS

7. The process of applying for a new license or authorization should be simple and clear, with the same requirements for both domestic and foreign applicants. A simplified application process can help reduce the start-up costs for new businesses, aiding both domestic and foreign small and medium-sized enterprises. Transparent, established, publicly available rules for licensing will help reduce arbitrary licensing. The activities for which an authorization or license to supply a service is required and the criteria to obtain, renew, retain, or relinquish such an authorization or license should be made publicly available and include a list of all the documentation and information normally required of the application in order to receive approval. In addition, criteria under which the regulator could suspend, revoke, or terminate an authorization or license should be made publicly available. Authorities should make public target deadlines within which applications should normally be processed; outline the process for notifying violations of the terms and conditions of a license, as well as a description of the nature and extent of disciplinary actions; and establish a mechanism to respond to inquiries on rules and regulations from service suppliers.

8. As stated in Article VI of the GATS, where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, regulators should promptly provide information concerning the status of the application. Other elements could further elaborate on Article VI. For example, if an examination is required for licensing or qualification, such examinations should be scheduled at reasonable intervals. Fees charged in connection with a license or authorization should be fair and reasonable, and should not be designed to limit applications. If an application is denied, regulators should provide a sufficient explanation justifying the action. Applicants should be given the opportunity to resubmit or amend their applications.

9. In a transparent application process, applicants must also bear responsibilities. Procedures for disciplinary actions for violations, including procedures for the notification of alleged violations, responses by the party subject to such disciplinary action, and an explanation of decisions should be made publicly available as well as any procedures for review or appeal of administrative decisions. Thus, if a dispute arises, an applicant, or authorization or license holder will be better able to submit its views and supporting documents in its own defense.

C. PROCEDURAL REVIEW AND REMEDIES:

10. Article VI:2 ensures the review and appropriate remedies for administrative decisions affecting trade in services. The right to procedural review allows all participants recourse in the event of a dispute. A transparent regulatory system generally should allow applicants the right to file complaints regarding their treatment or refusal to review an application, and the right of appeal in the event a license application is denied. In addition, service suppliers should be notified of regulatory

⁶ Ibid.

enforcement proceedings, and permitted to retain counsel of choice and submit evidence. The subjects of such proceedings should be allowed to review all evidence and be heard before an appropriate judicial or other review body. These rights lend legitimacy and credibility to the regulatory body provided all participants are treated fairly.
